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Toyota Motor North America, Inc. and
Toyota Motor Engineering & Manufacturing
North America, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(SOUTHERN DIVISION – SANTA ANA)

In Re: Toyota Motor Corp. Unintended
Acceleration Marketing, Sales Practices,
and Products Liability Litigation

This document relates to:

CV11-4143 CAS(AGR_x)

) Case No. 8:10ML02151 JVS (FMO_x)
)
) Assigned to: Hon. James V. Selna
) Discovery: Mag. Fernando M. Olguin
)
) **NOTICE OF MOTION AND MOTION OF**
) **DEFENDANTS TOYOTA MOTOR SALES,**
) **U.S.A., INC., TOYOTA MOTOR**
) **CORPORATION, TOYOTA MOTOR NORTH**
) **AMERICA, INC., AND TOYOTA MOTOR**
) **ENGINEERING & MANUFACTURING**
) **NORTH AMERICA, INC. TO DISMISS**
) **PLAINTIFFS' COMPLAINT FOR DAMAGES**
) **FOR LACK OF SUBJECT MATTER**
) **JURISDICTION; MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN SUPPORT**
) **THEREOF**

DATE: September 12, 2011
TIME: 1:30 PM
DEPT: Courtroom 10C

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 12, 2011 at 1:30 p.m. or as soon thereafter as the matter may be heard in Courtroom 10C of the Ronald Reagan Federal Building and U.S. Courthouse at 411 W. Fourth Street, Santa Ana, California, defendants Toyota Motor Sales, U.S.A., Inc., Toyota Motor Corporation, Toyota Motor North America, Inc. and Toyota Motor Engineering & Manufacturing North America, Inc. will move this Court for an order dismissing plaintiffs' Complaint for Damages under Federal Rules of Civil Procedure, Rule 12(b)(1) on the grounds that this Court lacks subject matter jurisdiction over this action. Specifically, the amount in controversy under the Magnuson-Moss Consumer Warranty Act is less than \$50,000 and would not therefore be a cognizable claim in a district court of the United States. Since plaintiffs do not allege diversity of the parties, there is no diversity, and the plaintiffs' claim under the Magnuson-Moss Consumer Warranty Act is the only federal question presented in their Complaint for Damages, this Court does not have jurisdiction and the matter must be dismissed.

This motion is made following the conference of counsel pursuant to L.R. 7.3 as set forth fully in the Declaration of Vincent Galvin and filed herewith.

This motion will be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support hereof, the exhibits attached to the Declaration of Vincent Galvin, on such oral and documentary evidence may be introduced at the time of the hearing, and on all papers and pleadings on file with the court herein.

Dated: August 8, 2011

Respectfully submitted,

By: /s/ Vincent Galvin

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Lead Defense Counsel for Personal
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action concerns an alleged unintended acceleration event involving a 2008 Toyota Camry. Plaintiffs allege that on November 5, 2010, four Utah residents were riding in a vehicle purchased in Utah, from a Utah dealership and later serviced by another Utah dealership (defendant Tony Divino Toyota), when they crashed in Wendover, Utah. Plaintiffs pursue claims for wrongful death and personal injury against Toyota Motor Sales, U.S.A., Toyota Motor Corporation, Toyota Motor North America, Inc. and Toyota Motor Engineering & Manufacturing North America, Inc. (collectively "Toyota Defendants") and allege the 2008 Camry was defective because it allegedly accelerated unintentionally and the brakes did not stop it.

This Court does not have diversity jurisdiction; it is not alleged in the Complaint and it is not the case since the plaintiffs and the servicing dealership named as a defendant in this action are all residents of Utah. Instead, the sole basis upon which plaintiffs seek to have this Court exercise subject matter jurisdiction is the "federal question" allegedly raised by plaintiffs' claim for relief under the Magnuson-Moss Consumer Warranty Act ("Magnuson-Moss"). However, the Toyota Defendants submit that plaintiffs' claim fails to satisfy the threshold requirements for subject matter jurisdiction in this Court.

Although plaintiffs allege that the amount in controversy for the Magnuson-Moss claim exceeds \$50,000, plaintiffs' verified Fact Sheet response attests otherwise. According to the plaintiffs, they purchased the vehicle new for about \$21,000. Further, the MSRP for this vehicle was only \$21,983. Under Magnuson-Moss' jurisdiction provision, a claim under the Act is not cognizable in federal court if the amount in controversy is less than \$50,000. Since Magnuson-Moss is the only claim based on federal law and since the Act's jurisdictional provisions have not been met, this Court does not have subject matter jurisdiction to entertain

1 this action. For this reason, the Toyota Defendants respectfully request that the entire action
2 be dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(1).

3 **II. PLAINTIFFS' ALLEGATIONS AND FACTS**

4 Plaintiffs allege they are residents of Utah. *Complaint for Damages* ("Complaint"),
5 Attached to the Declaration of Vincent Galvin ("Galvin Decl.") as Exhibit A, ¶¶ 21-28. The
6 subject vehicle is a 2008 Toyota Camry that was purchased by decedent Paul Van Alfen for
7 approximately \$21,000 from Menlove Toyota, a dealership located in Bountiful, Utah. *Plaintiff*
8 *Shirlene Van Alfen's Verified Supplemental Fact Sheet Responses*, Attached to Galvin Decl.
9 as Exhibit B, Nos. 38 & 39. Service on the subject vehicle is alleged to have been performed
10 by Tony Devino Toyota, which is also located in Utah. Complaint ¶ 32.

12 On November 5, 2010, decedent Paul Van Alfen was driving the subject vehicle on
13 Interstate 80 near Wendover, Utah. Complaint ¶ 36. Also in the vehicle were Mr. Van Alfen's
14 wife, Shirlene (front passenger seat), son, Cameron (right rear passenger seat) and
15 Cameron's fiancé, decedent Charlene Lloyd (left rear passenger seat). *Id.* Decedent Mr. Van
16 Alfen is alleged to have driven the subject vehicle onto a freeway exit ramp when the vehicle is
17 alleged to have suddenly and unexpectedly begun to accelerate and could not be slowed or
18 stopped by application of the brake pedal. Complaint ¶ 38. As a consequence of not being
19 able to control the subject vehicle, plaintiffs allege that Mr. Van Alfen traveled through a stop
20 sign and crashed into a wall. *Id.* Both Mr. Van Alfen and Ms. Lloyd sustained fatal injuries.
21 Complaint ¶¶ 39-40. Plaintiffs Shirlene and Cameron Van Alfen were also injured. Complaint
22 ¶ 41.

24 In this strict liability product defect case, plaintiffs also allege a claim for relief under
25 Magnuson-Moss and it is this claim that provides the sole basis for the Court's jurisdiction over
26 this matter. The claim under this cause of action is that the subject vehicle is alleged to have
27 not been of merchantable quality due to alleged design defects. Complaint ¶¶ 253-261; 269.

For purposes of this Motion, the only allegation that is at issue is plaintiffs' assertion that the amount in controversy for plaintiff's Magnuson-Moss claim is greater than \$50,000, exclusive of interest and costs. Complaint ¶ 272. Based on plaintiffs' own verified discovery responses, that allegation is wrong; the subject vehicle was sold new to the Van Alfens for "Approximately \$21,000." Galvin Decl., Exhibit B, No. 39. Furthermore, according to TMS's records, the Manufacturer's Suggested Retail Price (MSRP) was only \$21,983 and the vehicle was invoiced to the selling dealer at \$20,144. Galvin Decl., Exhibit C. Therefore, plaintiffs have not met the threshold requirement of a minimum of \$50,000 in controversy for federal jurisdiction.

III. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS MATTER AND MUST ACCORDINGLY DISMISS THE COMPLAINT

A. Dismissal of the Complaint Is Appropriate Under Federal Rules of Civil Procedure 12(b)(1)

The federal courts are courts of limited jurisdiction. They can therefore only adjudicate those cases which the Constitution and Congress has authorized them to adjudicate. Thus, the federal courts are limited in their adjudicatory authority to those cases involving diversity of citizenship, federal question, or the United States as a party. Kokkonen v. Guardian Life Ins. Co. (1994) 511 U.S. 375, 377. Under 28 U.S.C. §1331, federal judicial power has been granted to the District Courts, which have original jurisdiction in actions "arising under the Constitution, laws, or treaties of the United States." Federal courts presumptively do not have jurisdiction over civil actions and the burden of establishing the court's power to adjudicate lies with the party asserting jurisdiction. Kokkonen, 511 U.S. at 377.

The lack of federal subject matter jurisdiction may be challenged by a motion to dismiss under Rule 12(b)(1). As noted, the plaintiff bears the burden of establishing federal subject matter jurisdiction. Kokkonen, 511 U.S. at 377. A dismissal for lack of subject matter jurisdiction may rely solely on the allegations in the complaint, i.e., a "facial attack." Warren v.

1 Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). Or, the jurisdictional
2 challenge may rely on extrinsic and even disputed facts, i.e., a "factual attack." Roberts v.
3 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). When presented with a "factual attack" to
4 the plaintiffs' attestation of jurisdiction, the court may weigh the extrinsic evidence presented
5 and determine the facts for itself in order to determine whether the court has jurisdiction to
6 hear the matter. Id. Moreover, unlike a challenge to the pleading under Rule 12(b)(6), a
7 plaintiff's allegations are not presumed to be true once extrinsic evidence challenging the
8 Court's subject matter jurisdiction has been presented. Commodity Trend Service, Inc. v.
9 Commodity Futures Trading Commission, 149 F.3d 679, 685 (7th Cir. 1998).

11 **B. As There Is No Complete Diversity Among the Parties, Jurisdiction**
12 **Must be Based on the "Federal Question" Arising Under Magnuson-**
13 **Moss; But Plaintiffs Have Not Met the Strict Jurisdiction Provision**
Required by the Statute and Therefore There This Court Lacks
Subject Matter Jurisdiction

14 Here, plaintiffs do not allege diversity as a basis of subject matter jurisdiction because
15 there is no complete diversity among the parties. Namely, plaintiffs all and codefendant Tony
16 Divino Toyota are all residents of Utah. Consequently, the sole basis for plaintiffs' request that
17 this Court exercise subject matter jurisdiction is their claim under the Magnuson-Moss Act, but
18 this case still fails to meet the threshold requirements of the Statute to justify this Court's
19 continued involvement. Magnuson-Moss provides that "a consumer who is damaged by the
20 failure of a supplier, warrantor, or service contractor to comply with any obligation under this
21 chapter, or under a written warranty, implied warranty, or service contract may bring suit for
22 damages and other legal and equitable relief." 15 U.S.C. § 2310 subd. (d)(1). Suit may be
23 filed in state or federal court. Id. It should be noted, however, that the statute was drafted with
24 the intent that few such cases would actually be litigated in federal, as opposed to state, court.
25 "Congress has sought to limit plaintiffs' access to Federal courts. It established strict
26

jurisdictional requirements in an attempt to channel most of the Act's litigation into State courts." Welsh v. Ford Motor Corporation, 588 F.Supp. 1513, 1519 (D.C. D.C. 1984).

One of these jurisdictional requirements is that the amount in controversy under a Magnuson-Moss Act claim must exceed \$50,000. Personal injury claims are not included in the calculation of the \$50,000.00 threshold. Kelly v. Fleetwood Enterprises, Inc., 377 F.3d 1034, 1038-1039 (9th.Cir. 2004). Attorney's fees should also not be considered in the calculation to reach the \$50,000 threshold. Although this issue is not known to have been determined in the Ninth Circuit, "numerous other circuits have concluded that attorney's fees cannot be considered as part of this calculation because [Magnuson-Moss] excludes 'interest and costs' from the amount in controversy, and attorney's fees are 'costs' for the purposes of this analysis." Romo v. FFG Ins. Co., 387 F.Supp.2d 1237, 1239 (C.D.Cal. 2005) (citing authority from four other circuits). In other words, the amount in controversy is properly calculated by the "sum or the value" of the claim, exclusive of interests and costs such as attorney's fees. 15 U.S.C. 2310, subd. (d)(3)(B). Based on the plaintiffs' verified responses to the Fact Sheets and the MSRP, the Toyota Defendants assert that the "sum or value" of the claim, exclusive of interests and costs, is significantly less than \$50,000. Plaintiffs have therefore not met the amount in controversy threshold under Magnuson-Moss and this matter should be dismissed.

C. Remedies Under Magnuson-Moss Are Supplied Under Substantive State Warranty Law

Plaintiffs allege as part of their Magnuson-Moss claim that the subject vehicle "was not of merchantable quality." Complaint ¶ 269. Under a Magnuson-Moss Act claim for breach of an implied warranty, the courts are to look to the relevant state law to determine the meaning and creation of any implied warranty. 15 U.S.C. § 2301, subd. (7) ("The term 'implied warranty' means an implied warranty arising under State law ... in connection with the sale by

1 a supplier of a consumer product.”). The Fifth Cause of Action (sic) alleges a common law
2 claim for breach of implied warranty. Complaint ¶¶ 253-261.

3 The Fifth Cause of Action (sic) also alleges a common law claim for breach of express
4 warranty. Plaintiffs do not provide any detail about the alleged applicable express warranties
5 and it is therefore impossible to determine whether plaintiffs claim they are entitled to a full
6 warranty or a limited warranty. Nonetheless, under Magnuson-Moss, the remedy for a full
7 warranty is either replacement of the subject vehicle or refund of the purchase price of the
8 vehicle. 15 U.S.C. § 2304, subd. (a)(4). As has been demonstrated, the subject vehicle is
9 claimed by the plaintiffs to have been purchased new for \$21,000. The remedies listed in 15
10 U.S.C. § 2304 apply only to full warranties. Milicevic v. Fletcher Jones Imports, Ltd., 402 F.3d
11 912, 919 n. 4 (9th Cir. 2005). If the applicable express warranty is a limited warranty, then
12 “the courts must look to state substantive law to determine the remedies for breach of an
13 express limited warranty.” Gusse v. Damon Corporation, 470 F.Supp.2d 1110, 1117 (C.D.
14 Cal. 2007).

15
16 The subject vehicle was purchased in Utah from a dealer located in Bountiful, UT.
17 Galvin Decl., Exhibit B, No. 38. The subject vehicle was serviced in Utah by a Utah
18 dealership, codefendant Tony Divino Toyota. Complaint ¶ 32. The Van Alfens were the
19 registered owners of the subject vehicle. Complaint ¶¶ 37; 255. Decedent Mr. Van Alfen was
20 a resident of Utah. Complaint ¶ 21. Decedent Lloyd was a resident of Utah. Complaint ¶ 24.
21 All of the plaintiffs, including those claiming personal injury, are residents of Utah. Complaint
22 ¶¶ 22-23. The accident which gives rise to this lawsuit occurred in Utah. Complaint ¶¶ 36; 38.
23 Thus, the remedies for breaches of implied warranty and express limited warranty available
24 under Utah law should determine the “sum or the value” of plaintiffs’ Magnuson-Moss claim.
25 See Plagens v. National RV Holdings, 328 F.Supp.2d 1068, 1073, fn. 2 (D. Ariz. 2004)
26 (holding that Arizona law applied in a Magnuson-Moss claim where motorhome was
27

1 purchased in California, but delivered to purchasers in Arizona where they resided and where
2 the injuries ultimately occurred).

3 **D. The Remedies Available to Plaintiffs Under Utah's Applicable**
4 **Consumer Protection Laws Will Not Amount to \$50,000**

5 Under Utah's New Motor Vehicle Warranties Act:

6 If the manufacturer . . . is unable to conform the motor vehicle to any
7 applicable express warranty by repairing or correcting any defect or
8 condition that substantially impairs the use, market value, or safety of the
9 motor vehicle after a reasonable number of attempts, **the manufacturer**
10 **shall replace the motor vehicle with a comparable new motor vehicle**
11 **or accept return of the vehicle from the consumer and refund to the**
12 **consumer the full purchase price including all collateral charges,**
13 **less a reasonable allowance for the consumer's use of the vehicle.**
14 Refunds shall be made to the consumer, and any lienholders or lessors as
15 their interests may appear.

16 U.C.A. § 13-20-4, subd. (1) (emphasis added). Collateral charges for purposes of
17 section 13-20-4 would include sales taxes, document preparation fees and the cost of
18 any additional warranties that were included in the purchase prices. U.A.C. R152-20-2,
19 subd. (B)(1-3). Utah's New Motor Vehicle Warranties Act does not have a civil
20 penalties provision. See Joly v. National R.V. Inc., No 2:07-CV-522, 2007 WL 435361,
21 at *2 (D.Utah 2007). The Joly case moreover makes it clear that there is no civil
22 penalties provision in Utah for an alleged breach of implied warranty. Id.

23 As demonstrated in the exhibits that are attached to this 12(b)(1) motion to dismiss, the
24 subject vehicle, by the plaintiffs' admission, retailed for \$21,000. Under Utah law, if plaintiffs
25 were to demand the full purchase price of the vehicle, plus all collateral charges, the \$21,000
26 would be reduced a reasonable amount for the consumer's use. In this case, there was
27 45,730 miles on the vehicle at the time of the accident. Galvin Decl., Exhibit B, No. 46.
28 Whether the remedy is to refund the purchase price or replace this used vehicle with another
comparable vehicle, the sum or value of plaintiffs' damages will not reach the \$50,000
threshold that must be met in order to bring this Magnuson-Moss claim to federal court.

1 **IV. CONCLUSION**

2 For these and the foregoing reasons, the Toyota Defendants respectfully request that
3 the Court grant this Motion to Dismiss and dismiss plaintiffs' claims. Further, the Toyota
4 Defendants request that the Court not grant leave to amend for there are no additional
5 allegations that will cure the deficiency in plaintiffs' Complaint and give rise to this Court's
6 jurisdiction.

7 Dated: August 8, 2011

Respectfully submitted,

8 By: /s/ Vincent Galvin

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